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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(26)

19/12/07

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

CRIMINAL APPEAL No.851/05

APPELLANT Gopal Kosare, S/o Shri Midhu Kosare, aged about 61 years, R/o Gram Deori, Police Station Gunderdehi, District Durg (CG)

Vs

RESPONDENT State of Chhattisgarh through Station House Officer, Police Station Gunderdehi, District Durg (CG)

Present:
Mr. Sandeep Shrivastava with Mr. Anand Verma, Advocates for the appellant.
Mrs. Madhunisha Singh, Panel Lawyer for the respondent-State.

ORAL JUDGMENT

(14th December, 2007)

Per Dhirendra Mishra, J:

This criminal appeal is directed against the judgment of conviction and order of sentence dated 1.9.2005 passed in S.T. No.73/05 whereby learned Sessions Judge, Durg has convicted the appellant under Sections 376 & 506(Part II) of Indian Penal Code (for short 'IPC') and sentenced him to undergo R.I. for 7 years and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo additional S.I. for 3 months and R.I. for 1 year and to pay a fine of Rs.500/-, in default of payment of fine to undergo additional S.I. for 1 month respectively.

Case of the prosecution, in brief, is that the prosecutrix was suffering from pain in her waist, at the time of Diwali she had gone from Bhilai to Village Deori for treatment of the above pain, as the appellant practice sorcery. The husband of prosecutrix talked to the appellant

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

about this on which he advised him to bring the prosecutrix at the time of her menstruation period, whereupon the prosecutrix reached Deori on 30.11.2004 with her husband. In the evening the appellant treated the prosecutrix for 5 minutes in the presence of her husband, however he advised that the treatment is to be repeated 2-3 times. The husband of the appellant left the prosecutrix and returned Bhilai on the next day. On the date of incident i.e. 1.12.2004 the appellant went to the house of the prosecutrix and took her inside the room on the pretext of treatment, started massaging her stomach after removing the clothes and all of a sudden he inserted cloth in her mouth and committed rape with her. Her sister-in-law (Jethani) Kamla Ba, who resides in the adjacent house, reached there and saw the appellant committing rape with the prosecutrix. After the incident she returned to Bhilai and thereafter went to lodge the report in the police station Gunderdehi with her husband and FIR is Ex.P-1.

During investigation the prosecutrix was sent for medical examination to Primary Health Centre, Gunderdehi where Dr.(Smt.) R. Prassano (P.W.-7) examined her and gave the report of Ex.P-22. The appellant was also sent for medical examination to Primary Health Centre, Gunderdehi where Dr. Hemant Upadhyaya (P.W.4) examined him and gave the report of Ex.P-5. Underwear and vaginal slides of the prosecutrix and underwear and slides of the appellant were sent for chemical examination

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

to Forensic Science Laboratory, Raipur and the report of FSL is Ex.P-21.

After completing investigation, the charge sheet was filed against the appellant. During trial, the prosecution examined 7 witnesses in all and thereafter statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the evidence appearing against him in the prosecution case and pleaded innocence and false implication. The trial court after hearing learned counsel for the respective parties, convicted and sentenced the appellant as mentioned in Para-1 of this judgment.

Learned counsel for the appellant submits that the conduct of the prosecutrix is wholly improbable, her version is totally unreliable as in Paragraph 2 of her deposition she has stated that the appellant took her inside the room, started massaging her and all of a sudden inserted cloth in her mouth and committed rape with her. On hearing her shouts, her Jethani- Kamla Bai reached there and saw the incident, whereas in Paragraphs 9 & 10 she has stated that after making her lie on the floor the accused went out to fetch water and thereafter closed the door of the room and committed rape with her. He further contended that the prosecutrix in Paragraph 11 has stated that on hearing her voice the daughter of her Jethani aged about 2 years knocked the door and called her mother who forced upon the door when the accused left her and fled from there. Whereas Kamla Bai has deposed that her 6 years daughter Sonam told her that the prosecutrix is shouting, whereupon she rushed

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

there and saw that the door was open and inside the room the appellant was committing rape with the prosecutrix and on seeing her, the appellant fled from there. The incident was narrated by the prosecutrix to her. It was further argued that incident as alleged by the prosecutrix was impossible because the prosecutrix has not sustained any injury over her person, she did not raise any alarm at the time of incident and all her conduct goes to show that she was the consenting party and the report was lodged only because Kamla Bai, Jethani of the prosecutrix saw the appellant having sex with the prosecutrix. The prosecutrix has herself admitted in Paragraph 13 that because her Jethani had seen the act of intercourse, therefore she lodged the report. Neither she raised alarm nor did she offer any resistance, which is suggestive of her consent to the act of intercourse.

On the other hand, learned counsel for the State supported the impugned judgment.

I have heard learned counsel for the parties. I have perused the impugned judgment as also the evidence available on record.

Conviction of the appellant is based on the statements of the prosecutrix (P.W.1) and her sister-in-law (Jethani) Kamla Bai (P.W.2).

The substance of the evidence of the prosecutrix is that she suffers from stomach pain, her husband had contacted the accused, who resides in her neighbourhood village Deori and practices sorcery,

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whereupon the accused had called her on the first of the next month. On which she went to her village Deori, a day before the incident her husband talked to the appellant, who stated that he may proceed to Bhilai and he shall be treating the prosecutrix. After her husband left for Bhilai, the accused came at 9:00 in the morning to her house and asked her to come inside the room and lie, thereafter he started massaging her stomach, however after sometime he has started removing his own clothes and clothes of the prosecutrix and on her objection he inserted cloth in her mouth and committed rape with her and when she tried to shout he threatened her with life. Hearing her shouts, Kamla Bai, who resides at a distance, reached there and saw the incident when the appellant left her and fled from there, thereafter the prosecutrix narrated the incident to her. She also narrated the incident to Poonam, her brother-in-law. She went to Bhilai with Poonam and thereafter went to lodge report with her husband. In the cross-examination she has stated that after making her lie on the floor the accused went out for bringing water and after coming back with water he closed the door and when she insisted for opening the door he put his lungi in her mouth and mounted on her. In Paragraph 10 she states that there is no door in the room of her house, the door is fitted only in the verandah and when the appellant was massaging her, the door of the house was open and only after massaging when the accused returned with water, he closed the door. She has further stated that

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after hearing her shouts small girl aged 2 years knocked the door and thereafter she called her Jethani Kamla Bai who entered inside after forcing the door open. She has further stated that at the time of incident her Jethani had not entered the room and she did not see the act of rape and she came only after the accused left her. She came out of the room, went to her Jethani and narrated about the incident. In Paragraph 13 she has stated that it is correct to say that because her Jethani had seen the accused doing wrong thing with her, therefore she lodged the report. However she denied the suggestion that had the Jethani not seen the incident she would not have narrated the incident to others or would not have lodged the report.

P.W.-2 Kamla Bai has also stated that the appellant practises sorcery and prosecutrix had came for treatment of her stomach ache. The appellant came about 10-11 in the morning, took the prosecutrix in her room for treatment, her daughter Sonam aged 6 years accompanied her and after sometime she heard the shout of her daughter who came to her and told that her aunty is shouting. Thereafter she rushed to her house and saw that the door was open, she went inside the room and saw that the appellant had mounted over the prosecutrix and was committing wrong thing and after seeing her the appellant fled form there.

From the close scrutiny of the evidence of above two witnesses it is evident that there are material discrepancies and inherent contradictions

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

in the statement of the prosecutrix. The prosecutrix firstly states that while the accused was massaging, he made advances by further removing her clothes and started removing his own clothes. However subsequently she states that after the act of massaging the appellant went out on the pretext of bringing water and thereafter closed the door from the inside and forcibly raped her after gagging her mouth. At one place she states that the room in her house does not have door, whereas on the same breathe she claims that the appellant closed the door from the inside. Initially she claims that her Jethani came and saw the appellant committing rape with her, however in the cross-examination she states that her Jethani did not enter inside the room, she came out and went to her and narrated about the incident. Her admission in Paragraph 13 that she lodged the report because her Jethani saw her in the compromising condition with the appellant is significant though she has denied the suggestion subsequently that she would not have lodged the report had she was not seen by her Jethani. Kamla Bai (P.W.2) nowhere states that she heard the shouts of the prosecutrix and only states that when she entered inside the room, the door of the room was open and she saw the appellant doing bad thing with the prosecutrix.

Overall evidence of the prosecutrix does not inspire confidence for the aforesaid reasons. The absence of injury on her person as noticed by Dr.(Smt.) R. Prassano (P.W.-7) also suggest that she did not resist the

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attempt made by the appellant. The trial Court considering the evidence available on record in Paragraph 18 has held that even if it is assumed that the prosecutrix gave consent for intercourse the same would not amount to free consent, as the act was done while the appellant was massaging her stomach on the pretext of treatment and thereby he provoked the prosecutrix for intercourse and therefore consent so obtained cannot be termed to be free consent. I am unable to accept the reason assigned by the trial Court for reaching to the conclusion that the consent, if any, given by the prosecutrix was obtained by provocation and therefore the same is not free consent. The prosecutrix is a married and a grown-up lady and in these circumstances the finding of the trial Court that the consent was obtained by provocation during treatment and therefore the same is not a free consent, is not acceptable.

On the basis of aforesaid analysis I am of the considered opinion that the version of the prosecutrix that the appellant raped her against her consent and will by gagging her mouth does not inspire confidence and the defence of the appellant that the prosecutrix was the consenting party to the act of intercourse may be probablized.

In the result, the appeal succeeds. Conviction of the appellant under Sections 376 & 506 (Part-II) and sentences imposed under those

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	Sections are hereby set aside and the appellant is acquitted of all the charges. The appellant be set at liberty forthwith if not required in any other case. Certified copy as per rules.	Sd/- DHIRENDRA MISHRA Judge